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REVIEW OF RULINGS BY STATE COURTS BY THE FEDERAL SUPREME COURT IN ACTIONS BASED ON FEDERAL LAW.

A dissenting opinion by Mr. Justice Pitney in the case of St. Louis I. M. & S. R. Co. v. McWhirter, 33 Sup. Ct. 858, argues, strongly, that there is no appeal from a State Supreme Court to the Federal Supreme Court for an erroneous construction of the federal law, upon which a right of action is based.

Thus he says: "Let it be conceded, for present purposes, that the (state) trial court erroneously instructed the jury that the effect of the violation of the hours of service act was to create an unconditional liability for an accident happening after the expiration of the sixteen hour limit, and to render the carrier an insurer of the safety of the employee while working beyond the statutory time. And let it be further conceded that the trial court held, and erred in holding, that there was enough in the evidence to warrant a finding that the locomotive engineer was negligent so as to make the carrier liable under the employers' liability act. . . . It still does not seem to me that the state courts, in overruling defendant's objections to the instructions referred to, or in denying the motion (and sustaining such denial) for direction of a verdict in defendant's favor decided *against* any title, right, privilege or immunity specially set up or claimed by the defendant under the constitution or laws of the United States within the meaning of §709, Revised Statutes, Judicial Code, §237."

The learned Justice quotes in full the statute authorizing review from a state court and it must be thought that it is only upon its last clause that the right of review in the case at bar is to be based. That authorizes review: "Where any title, right, privilege or immunity is claimed under the constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority."

Here the learned Justice says everybody, plaintiff and defendant, conceded the existence and validity of the statute upon which the cause of action was based, but the state courts held it to mean one thing, while the defendant claimed it meant another, so far as its application to the case on trial was concerned.

After citing a number of cases the learned Justice says : "In all these cases the word 'immunity' like the associated words 'title, right, privilege,' has been given its normal affirmative force, the clause meaning not that the plaintiff in error may have merely denied a federal right asserted against him by his adversary, but that he must have claimed exemption from a liability or obligation asserted against him on grounds of state or of federal law by specially setting up an immunity because of some statute or treaty or constitutional provision of the United States."

He further said that these cases show that the purpose of the statute "was to prevent the state jurisdictions from impairing or frittering away the authority of the federal government by failing to give full force to the statutes, etc., established by that government; and that therefore the writ of error will lie only when the decision is adverse to the federal right asserted in the state court by the plaintiff in error; and that a decision in the state jurisdiction upon a federal question, however erroneous the decision may be, is not to be corrected in this court if the decision be in favor of the right to immunity that is set up under the federal authority."

We submit that the reasoning is difficult to follow, but we think we see in it, that the Justice conceived that Congress was thinking, when it framed the statute, that causes of action in state courts were based

on other law than federal law and that there should be given to the Federal Supreme Court a right of review, where some right, etc., guaranteed by federal law—the supreme law of the land—was being set up in opposition to that other law. If the federal law was denied its force against that other law, the suitor appealing for its application was to be protected.

In this case, however, no other law than that of the federal law is in question and, therefore, the inquiry is whether or not there is a *casus omissus* so far as the right of review by the Federal Supreme Court is concerned.

The Chief Justice, in the majority opinion, says: "It is true that, although the case was exclusively rested upon federal statute, as it comes here from a state court. our power to review is controlled by Rev. Stat. 709, and we may therefore not consider merely incidental questions not federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the federal statutes to which his recourse by the pleadings was exclusively confined, or the converse, that is to say the right of the defendant to be shielded from responsibility under that statute, because, when properly applied, no liability on his part from the statute would result. . . . And of course, as the cause of action alleged was exclusively placed on the federal statute, and the defense therefore alone involved determining whether there was liability under the statute, the mere statement of the case involved the federal right and necessarily required, from a general point of view, its determination."

This does not get down precisely to Justice Pitney's objection. He admits that "the questions thus raised were undoubtedly federal questions in the general sense," but not in the limited sense in the statute, and it seems also to be true from what the Chief Justice says, that there is more of limitation in the right of review than had this case been tried in a federal district court. What may be the shade or shades of difference we do not attempt to state.

It might be thought, too, that, were the right of review as broad as from a federal district court to a circuit court of appeals, then there really ought not to be any interposition of a state supreme court between the state court of original jurisdiction and the federal Supreme Court, when "the cause of action alleged is exclusively based on a federal statute." If the state supreme court performs any function at all, that is conclusive, what is it? If there is nothing done by it, in such a case, that is conclusive, why have it in the program at all? As, however, it is there by force of the statute giving the right of review, may there not be more than an exhibition in dialecties in what is advanced by Justice Pitney? The very fact of its interposition goes to show that Congress had in mind only the ignoring of the supreme law of the land by a state court and this it intended to prevent. That it is highly desirable that state courts may not play the role of differing from federal courts about federal law, though federal courts differ from state courts about state law, does not of itself prove that there is any right of review by the federal Supreme Court.

NOTES OF IMPORTANT DECISIONS

BANKRUPTCY—DISCHARGE FROM DEBT CREATED WHILE ACTING "IN ANY FIDUCIARY CAPACITY."—It was contended before the Supreme Judicial Court of Maine, that, notwithstanding construction of the bankruptcy statutes of 1867 and 1898 that the prohibitions against discharge from any debt created by one acting "in any fiduciary capacity" relate only to special trusts and not those arising out of failure by factors and commission merchants and agents selling property for their principals, yet special recitation in contracts might put these on the footing of those executing special trusts. American Agricultural Chem. Co. v. Berry, 87 Atl. 218.

Thus the agency contract in this case provided that: "All proceeds of sales and goods remaining unsold to be our (principal's) property and you are to have no title or lien upon

said fertilizers or their proceeds. It is specially agreed that you will hold the same in trust and separate for the settlement of our account with you. All sales shall be guaranteed by you, and the specific proceeds of the same are to be sent to us as received by you; and until the proceeds of such sales are received by us, the same shall be held by you in trust for us."

The court thought that the case was not strengthened in any way. "The use of the word 'trust' does not alter the relations between the parties so as to create such a fiduciary relation as would escape the bankrupt act. * * * Had it been an oral agreement the rights of the parties would have been the same. Reducing the contract to writing, and inserting the word 'trust' did not change its character." It was said the statute meant something else which the courts have called "a technical trust."

ORAL MODIFICATION OF CONTRACTS REQUIRED BY THE STATUTE OF FRAUDS TO BE IN WRITING.

An ever-recurring question met by practitioners is: When may a written contract be modified, abrogated or discharged by parol, and when may it not? The question most frequently arises in connection with the trial of a cause involving a written contract which one party to the litigation seeks to vary or modify by parol testimony that would contradict the plain provisions of that contract. In such a case the rule is pretty well established that a party will not be heard to contradict the terms of the written agreement. In cases where the meaning of the contract is ambiguous, the court will receive parol testimony, not for the purpose of contradicting any portion of it, but in aid of it, by placing before the court evidence from which may be gathered the real intention of the parties. Because of the frequency with which these rules are applied, they have become too elementary to require citation of the legions of cases that support them.

From a consideration of the cases in which these rules are applied, it at once becomes apparent that the contracts involved are executed agreements. They are instances where one party to the written agreement has performed the stipulations required of him and is seeking to enforce his rights thereunder as a result of his performance, or where one party has offered and tendered performance and is claiming the benefits of an executed contract. Another phase of this question as to oral modification of written agreement is; May parties to a written contract modify, abrogate or discharge that contract while still executory by a subsequent agreement not in writing? In other words, can one party to a written contract enforce the provisions of that contract, when, before it is executed, the parties make a new agreement about the same subject matter, which new agreement is not reduced to writing? These seem simple questions, and yet they have arisen a considerable number of times in various jurisdictions, and the decisions have quite distinctly ranged themselves into two classes, depending upon the nature of the written contract which forms the subject of the controversy. The classification made by the courts is with reference to whether the written contract is one within the Statute of Frauds or not. If a contract is reduced to writing by the parties of their own volition as a matter of convenience, and not because of any requirement of the statute, such a contract, while still executory, may be modified, abrogated or discharged by a subsequent oral contract regarding the same subject matter. It not being the intention of the writer to discuss the reasons assigned in support of this rule, suffice it to say, that by the substitution of such an oral contract for the written agreement, the parties have not been deprived of their rights, since the new oral contract may be enforced in an appropriate proceeding in the courts. If, on the other hand, the contract sought to be modified, abrogated or discharged is in writing because of the requirement of the

Statute of Frauds, then, the courts hold, the subsequent contract cannot rest in parol but must be of equal dignity to the one sought to be modified. The writer purposes to show the reasoning adopted by the courts in support of this last rule, and to show some modifications made of it by a recent decision.

The purpose of the Statute of Frauds is clearly expressed in its name. The object of requiring certain contracts to be in writing in order to impart validity, was to prevent frauds arising from allowing the terms of those contracts to rest in parol. It is not strange, then, to see the original purpose of the Statute of Frauds carried forward into the decisions respecting the modification of those contracts, and even their abrogation and discharge. The California court, in the case of *Adler v. Friedman,* 16 Calif. 139, has given the reason of the rule adopted in apt language. The plaintiff in the action sought to recover on a promissory note interest at the rate of 2½ per cent per month in accordance with the terms of the note. On the trial the defendant offered to show a reduction of the rate of interest by a parol agreement with the plaintiff. The rejection of this offer was assigned as error. In affirming the holding of the trial court, the appellate court said:

"The general rule is, that extrinsic, verbal evidence is not admissible to contradict or vary the terms of a written agreement. This rule is not infringed by the admission of such evidence to prove that the written agreement has been discharged, or to establish a new and distinct contract, upon a new consideration, which takes the place of, and is a substitute for the old. In the latter case, however, it must appear that the old agreement is rescinded and abandoned, and it is not competent to show by parol the incorporation of new terms and conditions. It is obvious, too, that the new agreement must be valid in itself, and such may be made the basis of an action.

"Under our statute, parol evidence is not admissible, in any case, for the purpose of establishing a claim to interest beyond the statutory rate. Such a claim must be evinced by writing, or it is invalid and cannot be enforced. The effect of the proof in this case would have been to establish a contract upon which the plaintiff could not recover. No action can be maintained upon it, and no effect can be given to it as the modification of the terms of the original agreement."

The New York court, in *Hasbrouck v. Tappen,* 15 Johns. (N. Y. Com. Law Repts.) 200, was called upon to pass on the same question in an action on covenant to recover stipulated damages. The defendant had entered into a written agreement to convey to the plaintiff certain lands free and clear within a specified time or pay stipulated damages. The plaintiff extended the time orally, and it was contended on the trial that this oral extension of time amounted in law to a waiver of the stipulated damages. The Chief Justice charged the jury that the plaintiff was entitled to a verdict. After saying that such a parol agreement would be within the Statute of Frauds, the court said:

"If this is to be considered a new agreement, which in any manner affects the covenant, the plaintiff's whole remedy is gone. He can no more sustain an action for his real damages to be proved than he can for the stipulated damages; and this was not pretended at the trial. An agreement absolutely void can never be considered as altering, revoking or modifying a valid contract . . . but when the new contract is void in law, and the party without remedy if turned over to it, it would be extremely unjust."

This doctrine was approved in *Jewell v. Shroeppel,* 4 Cowen 564, *Baldwin v. Munn,* 2 Wendell, 405, and in *Delacroix v. Bulkley,* 13 Wendell 74, the court said:

"A void agreement can never be considered an alteration of a valid contract."

The Supreme Court of the United States has also given expression to the same doctrine in similar language. *Swain v. Seamens,* 9 Wallace 254, was a case wherein the plaintiff sought to compel the defendant to cancel a certain mortgage, reliance being had upon a verbal modification of the

terms of the mortgage. In holding contrary to the contentions of the plaintiff, the Supreme Court of the United States, after pointing out that the Wisconsin statute, which controlled in this case, provided that no interest in land except leases for less than one year shall be created except by operation of law or conveyance in writing, said:

"Numerous authorities sanction the principle advanced by complainants in cases not within the Statute of Frauds, and which fall within the general rules of the common law, and in such cases it is held that the parties to an agreement though it is in writing, may, at any time before the breach of it, by a new contract not in writing, modify, waive, dissolve or annul the former agreement, if no part of it is within the Statute of Frauds. (Citing cases.)

"Reported cases may also be found where the rule is promulgated without any qualification; but the better opinion is, that a written contract falling within the Statute of Frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of *Marshall v. Lynn*, 6 Mel. & W. 109, is, that the terms of a contract for the sale of goods falling within the Statute of Frauds cannot be varied or altered by parol; that where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing."

This court has adhered to the reasons assigned in the foregoing case in a number of later decisions, and especially does it emphasize the distinction between contracts not within the Statute of Frauds and those within its operation in *Emerson v. Slater*, 22 How. 42, *Hawkins v. U. S.*, 96 U. S. 689, *Chesapeake & O. Canal Co. v. Ray*, 101 U. S. 522. In the *Emerson* case the court said:

"After the contract has been reduced to writing, the parties, in cases not within the Statute of Frauds, may, at any time before the breach of it, by a new contract not in writing, either waive, dissolve, or annul the former contract, or add to, or subtract from, or vary, or qualify the terms of it, and thus make a new contract."

In the *Hawkins* case the following language was used:

"Subsequent oral agreements between the parties to a written contract not falling within the Statute of Frauds, if founded on a new and valuable consideration, may, when made before the breach of the written contract, have the effect to enlarge the time of performance specified in the written instrument, or may vary any other of its terms, or may waive and discharge it altogether."

In the *Chesapeake & O. Canal Co.* case the court said:

"The terms of a contract under seal, where the Statute of Frauds is not involved may be varied by a subsequent parol agreement, express or implied."

It is to be noted that the authorities mentioned agree, that to discharge a written contract within the Statute of Frauds by a subsequent agreement between the parties, such subsequent agreement must be of equal dignity with that sought to be discharged, or, in other words, the new agreement must be such a contract as would be valid and capable of enforcement. No exception seems to have been recognized by any of them. Some courts, however, do qualify the rule to the extent that there may be sufficient performance under the new oral agreement as to take it without the Statute of Frauds, or, at least, to make it inequitable to allow a party to stand upon the written agreement after a part performance of the oral modification. Such seems to be the rule adopted by the Washington Supreme Court. The case of *Thill v. Johnston*, 60 Wash. 393, was an action brought to compel specific performance of a contract affecting real property, which, under the state statute, must be in writing. The defendant sought to show that the written contract had been abrogated by a new oral contract. In holding that this was not permissible, the court said:

"It is contended that the learned trial court erred in not permitting the appellants

to show that this contract was abrogated by a new contract. The offers of proof on this subject consisted only of oral testimony tending to show that the parties had abrogated the contract by making a new one. No competent evidence was offered to show that any new contract having any effect upon the original one was made in writing. This original contract being for the conveyance of an interest in real property, it was, of course, required by law to be in writing. *Nichols v. Opperman,* 6 Wash. 618, 34 Pac. 162; *Brewer v. Cropp,* 10 Wash. 136 Pac. 866; *Swash v. Sharpstein,* 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796; *Graves v. Graves,* 48 Wash. 664, 94 Pac. 481.

"Counsel for appellants invoke the general rule that a written contract may be abrogated or modified by a subsequent parol contract made between the same parties, citing, *Tingley v. Fairhaven Land Co.,* 9 Wash. 34, 36 Pac. 1098. This rule, however, does not authorize the abrogating of a contract by a new parol contract when the original contract is by law required to be in writing. Such a contract cannot be abrogated or rescinded by a parol contract, *except such new parol contract is accompanied by acts of part performance sufficient to take it out of the requirement of the law that it shall be in writing. Spinning v. Drake,* 4 Wash. 285, 30 Pac. 82, 31 Pac. 319.

"It is suggested that the offers of proof included a showing of part performance of the new contract. The only acts of part performance which we regard as at all referable to the new contract sought to be shown was payment of the consideration therefor, but this of itself is not sufficient to take the place of the requirement of the law that such contract shall be in writing."

The next time the Washington court was called upon to pass on this question, was in the case of *Gerard-Fillio Co. v. McNair,* 68 Wash. 321. In that case, the plaintiff declared on a written contract for commissions for the sale of real property, which under the Statute of Frauds was required to be in writing in order to be valid. The defendant pleaded in defense an oral modification of the written contract, or rather the discharge of the written contract by a subsequent oral contract entered into while the written contract was still executory and tender of performance. The trial court sustained a motion for judgment on the pleadings in favor of the plaintiff. On appeal, the Supreme Court reversed the holding of the trial court, and in so doing, said:

"The second question, whether the verbal contract modifying the original written contract was within the Statute of Frauds, is of more difficulty. In this state a contract employing an agent to sell or purchase real estate for a commission must be in writing in order to be valid. Rem. & Bal. Code, Sec. 5289. And this court has held that a contract modifying or abrogating a prior written contract required by statute to be in writing must itself be in writing to be obligatory. *Spinning v. Drake,* 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; *Thill v. Johnston,* 60 Wash. 393, 111 Pac. 225. And we have held also that an oral contract for the payment of a commission for selling or purchasing real estate, although fully performed, is not enforcible. *Keith v. Smith,* 46 Wash. 131, 89 Pac. 473. These principles are relied on to support the judgment of the trial court; but it seems to us they do not meet the question presented. While it is the rule that a written executory agreement to sell or purchase real estate cannot be rescinded or abrogated by an oral executory agreement to rescind or abrogate it, it does not follow that such an agreement cannot be modified or abrogated by an executed oral agreement. On the contrary it is recognized by our own cases above cited, and it is the rule of all the cases in so far as we are advised, that an executed oral contract to modify or abrogate a written contract, required by the statute to be in writing, can be successfully pleaded as a defense to an action of the original contract. To hold otherwise is to make the Statute of Frauds an instrument of fraud; *for it would be a fraud to allow a person to enforce a contract which he had agreed on sufficient consideration to modify or abrogate after he has accepted the consideration for its modification or abrogation. It is for this reason that equity allows a performance or a substantial part performance of a contract, invalid because not in writing, modifying or abrogating a valid contract to be pleaded as a defense to an action on the valid contract.* To do otherwise would be to allow one of the parties to have the benefit of both contracts when in equity

and good conscience he should have the benefit of but one. The case of *Keith v. Smith, supra,* is not contrary to these principles. To allow one entering into an oral contract to sell or purchase real estate on commission to recover his commission merely because he had performed the contract would render nugatory the statute requiring such contracts to be in writing. As was said in the case cited, a claim for commission from its very nature cannot be made until earned, and to hold that performance would take an action of this character out of the operation of the statute would nullify the statute itself."

Certain parts of the two last excerpts from opinions have been italicised to show that under the holdings of the Washington court, a contract, void under the law because not in writing, if partially performed, may be successfully pleaded in defense to an action on the valid contract sought to be abrogated or discharged by the invalid oral contract, although it be substituting for the valid contract one that the plaintiff could not enforce should he seek to make it the basis of an action. In this respect these holdings differ essentially from those quoted earlier in this article. It is also to be noted that in the *Thill* case the court says that the payment of a consideration for the making of the new oral contract would not take it out of the Statute of Frauds sufficiently to permit it to be interposed as a successful defense, while in the *Gerard Fillia Co.* case it expressly says that it would be inequitable to permit the plaintiff to maintain his action on the original written contract "when he has accepted the consideration for its modification or abrogation."

If the holding of the Washington court is a proper modification of the general rule on this subject, though we have been unable to find any cases in other jurisdictions to the same effect, the law would seem to be that in cases where the parties have sought to modify or abrogated a written contract within the Statute of Frauds while still executory by a subsequent oral contract invalid because not in writing, such oral contract may not be pleaded in defense unless the party seeking to enforce the original written contract has received some substantial benefit under the modified oral contract. It is to be noted, however, that the modification of the rule, to a degree at least, nullifies the purpose of the Statute of Frauds, for it permits the results of litigation to be determined by oral testimony, one of the things primarily sought to be eliminated by the enactment of the statute. We believe the holding of the California courts in the *Adler* case, to the effect that the contract pleaded in defense "must be valid in itself, and such may be made the basis of an action," to be the better rule, for while it may work a hardship in individual cases, a thing that is not uncommon to the law, it would, at least, eliminate the possibility of perjured oral testimony, and render definite and known what would otherwise become indefinite and uncertain. W. F. MEIER.

Seattle, Washington.

CONTRACTS—RESCISSION.

MISSOURI LOAN & INVESTMENT CO v. FEDERAL TRUST CO. OF ST. LOUIS.

St. Louis Court of Appeals. Missouri. June 24, 1913.

158 S. W. 111.

The right to rescind a contract in equity on the ground of fraud cannot be predicated on a misrepresentation involved in the breach of a promise as to a future performance, though the promissor intended at the time of the making of the promise not to keep it.

NORTONI, J. This is a suit in equity wherein the cancellation of a contract is sought on the grounds of fraud and deceit in its inducement. The finding and judgment were for plaintiff, and defendant prosecutesthe appeal.

Plaintiffs are copartners engaged in conducting a farm loan business under the firm name of the Missouri Loan & Investment Company. Defendant is a trust company incorporated under the laws of Missouri. It appears that immediately after defendant was incor-

porated, and while it was yet placing its capital stock throughout the state, an agent for it, possessing full authority in that behalf, called upon plaintiffs and negotiated a sale of ten shares of its capital stock to them. The stock was sold to plaintiffs by defendant through its agent at $150 per share; that is, for a total sum of $1,500 for the ten shares. Plaintiffs paid defendant $500 cash on account of the transaction at the time and executed their four promissory notes of $250 each for the balance of the purchase money. A few weeks thereafter they paid defendant the amount of two of the notes so executed and later instituted this suit to cancel the contract of purchase and likewise the two promissory notes yet unpaid and to recover as well the amount theretofore paid on the stock and in liquidation of the notes. The cancellation is sought on the grounds of fraud and deceit in that defendant, through its agent, promised at the time plaintiffs purchased the stock to commence 30 days thereafter and furnish them all the money they desired to loan on real estate in Dunklin county at 6 per cent interest; in no case, however, should the loan exceed 50 per cent of the value of the real estate offered as security. It is averred that defendant promised this as an inducement for plaintiffs to purchase the stock; that they relied upon such promise and were thus induced to subscribe for the stock in defendant corporation and make the payment and execute their notes therefor; and that plaintiffs were deceived and defrauded thereby in that defendant did not intend to keep the promise when made and has since repudiated it.

Plaintiffs, copartners, are engaged in negotiating loans in Dunklin county for others on commission. Upon receiving an application for a loan on real estate, they procure the money from some person desiring to invest in such security, examine the title to the land, and cause the papers, etc., to be executed, for all of which a commission is exacted from and paid to them by the borrower. Of course, to successfully conduct a business of this character, it is essential to have money available at a reasonable rate of interest with which to consummate the proffered loans. Defendant's agent called upon plaintiffs and induced them to purchase the ten shares of stock involved here at $1,500. The evidence tends to prove, and the court so found the fact to be, that defendant's agent, in order to induce plaintiffs to purchase the stock, make the cash payment thereon, and execute the notes therefor, promised that the defendant trust company would furnish them all of the money required to take care of such real estate loans as they might procure at 6 per cent interest, but in no case to loan more than 50 per cent of the value of the land offered as security. While such agreement appears to have been made, it appears conclusively, too, that defendant's agent represented to plaintiffs it was not then prepared to take care of the farm loan business but would do so after 30 days from that date if plaintiffs would purchase the stock as above stated. More than 30 days afterward, and subsequently, plaintiffs submitted to defendant a number of good farm loans and applied for the money to consummate them in accordance with this agreement, but defendant rejected them in each instance. Finally defendant asserted it had failed to make proper connections with eastern financial concerns, and therefore would not abide its agreement to furnish plaintiffs money for the loans contemplated. No other misrepresentation of fact is revealed in the case, and it therefore appears the ground for the relief relied upon relates alone to the breach of the promise so made concurrently with the contract sought to be rescinded. There is evidence tending to prove, when the facts and circumstances attending the transaction are all considered together, that defendant did not intend to keep this promise at the time it was made. The court found the issue for plaintiffs and decreed the relief prayed for on the theory that this promise, so made in bad faith on the part of defendant as an inducement to the purchase, vitiated the contract in its entirety in that defendant did not intend to keep and comply with its terms. From the special finding of fact made by the court in compliance with defendant's request under the statute, it appears the judgment is predicated solely on the proposition so stated. Touching this matter the court found: "That the sole consideration and inducement to plaintiffs was the promise and agreement stated above. That plaintiffs were deceived by said representations and promises on the part of defendant. That said representations were not made in good faith, but were so made as a device to induce plaintiffs to enter into said contract of subscription."

It is conceded that no misrepresentation of a past or existing fact appears in the case, but it is argued that, as it appears the promise was made merely as a means of deceiving plaintiffs and with no intention to perform, it will support an action of deceit as for the cancellation of the contract so induced. See 20 Cyc. 22. There can be no doubt that such

is the rule of decision in many jurisdictions but not in all. Indeed, many of the courts repudiate the doctrine thus invoked entirely and adhere to the rule that, unless the misrepresentation pertains to a past or existing fact, no right to relief whatever obtains. See 14 Am. & Eng. Ency. Law (2d Ed.) 50, 51, 52; 20 Cyc. 20, 21, 22. But the principle invoked here has been frequently applied and enforced by the courts of this state where the rescission sought is of a contract for goods purchased by an insolvent, who at the time he promised to pay therefor intended not to do so. We believe on this question the authorities quite generally support the right to relief where such bad faith appears in the matter of purchasing goods by an insolvent. See Bidault v. Wales & Sons, 20 Mo. 546, 64 Am. Dec. 205; Fox et al. v. Webster, 46 Mo. 181; Elsass v. Harrington, 28 Mo. App. 300; Reid & Co. v. Lloyd, 67 Mo. App. 513; 14 Am. & Eng. Ency. Law (2d Ed.) 51. If the principle thus stated is available as a ground of relief in such cases we are at a loss to understand why it should not be equally so here. There can be no doubt that it is salutary and just in its proper application in every instance, and we are unable to perceive why it should not obtain with respect to cases of the character of this one. When it is remembered that the promisor impliedly represents that he intends to perform his promise and therefore falsely represents the condition of his mind at that time, it would seem that such should be regarded as the representation of a then existing fact concerning his mental attitude. In this view the principle should find application alike in cases of rescission, without regard to the matter of the insolvency of the purchaser. It would seem that, if it is a fraud to purchase goods on a promise to pay for them where there is an intent not to pay, it is a fraud too to induce a man to part with his property by means of other promises made with a then present intent not to perform them. For a highly intelligent discussion and application of the doctrine, see Ayres v. French, 41 Conn. 142, Am. & Eng. Ency. Law (2d Ed.) 53.

(1) But, be this as it may, the question is concluded here by a controlling decision of the Supreme Court which, according to the constitutional mandate, is the rule of decision with us.

(2) The doctrine of our Supreme Court, according to its latest decision, is that which prevails in many of the states and proceeds according to the view that a representation to amount to fraud, must assert a fact or facts as existing and cannot relate to the future. If it does, it is not fraud, whatever may be the intention of the party or the effect of his statement. 14 Am. & Eng. Ency. Law (2d Ed.) 53; 20 Cyc. 20, 21. It is said, in a leading case which was ruled by the Illinois court in this view, that: "If an intention not to perform constituted fraud, every transaction might be avoided where the facts justified an inference that a party did not intend to pay the consideration or keep his agreement." See Miller v. Sutliff, 241 Ill. 521, 89 N. E. 651, 24 L. R. A. (N. S.) 735. Such seems to be the judicial thought which controls in those courts where that doctrine is adhered to. Obviously our Supreme Court entertains that view in those cases not involving the fact of insolvency, for it but recently declared that the right of rescission of a contract in equity could not be predicated on a misrepresentation involved in the breach of a promise as to a future performance, though the promisor intended at the time the promise was made not to keep the faith it implied. Touching this question the court said: "One reading the plaintiff's testimony is impressed with the idea that his main grievance is that he was not given the position of secretary and treasurer at a salary of $100 a month. Assuming that the evidence proved that such promise was made, it would not justify a rescission of the contract on the theory of misrepresentation. A promise, though made without intention to fulfill, is not a misrepresentation of an existing fact." See Younger v. Hoge, 211 Mo. 444, 455, 456, 111 S. W. 20, 22, 18 L. R. A. (N. S.) 94. The authority quoted is directly in point and controlling here under the express mandate of our Constitution, for it appears to be the latest decision of that court on the question.

Therefore, though it be as the court found that defendant made the promise in bad faith and intended at the time not to keep it, no ground for cancellation of the contract appears. This being true, the judgment should be reversed. It is so ordered.

ALLEN, J., concurs. REYNOLDS, P. J., concurs in the result only.

NOTE.—*Fraudulent Promise as Ground for Cancellation of Contract or Conveyance.*—The instant case has much, if not the weight of authority behind it, even though the fraudulent promise be the inducement to a contract or conveyance sought to be avoided. We first show, however, as we think, that the case cited by the instant case as controlling it seems to have nothing to do with the question.

The case of Younger v. Hoge, 211 Mo. 444, 111 S. W. 20, 18 L. R. A. (N. S.) 94, upon which the decision in the instant case is based, required no such ruling, as was necessary to sup-

port that decision, because the promise, as the opinion in the former case shows, was a conditional, and not an absolute, promise. But the opinion does say, *arguendo*, that: "A promise, though made without intention to fulfill, is not a misrepresentation of an existing fact. Wade v. Ringo, 122 Mo. 322, 25 S. W. 901; Estes v. Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316.

Turning to these cases we find that the headnote in the former, saying: "Representations as to the utility of a mechanical improvement, made to a person experienced in the sale of the article who has every opportunity to test it and the opinion of friends and an expert to aid him, though in fact untrue, do not constitute sufficient grounds for rescission of the sale of the patent right" fairly represents the question involved therein. There is not a word said in the case about lack of intent to fulfill any promise of performance and, indeed, nothing of that kind would have been appropriate, because there was merely an exchange of property with nothing further to be done by either party in and about the matter, if the exchange stood.

The other case was a suit for wrongful discharge by a master of a servant under a reemployment contract. Defendant set up that plaintiff obtained the re-employment under fraudulent representations as to the amount of business previously done by plaintiff as a traveling salesman for defendant, all of which appeared in defendant's own books. An instruction by the court that if the jury "should find that plaintiff made no representations, or if he made any, they were true, or if he made representations that were untrue but defendant did not rely upon them, or knew to the contrary, the jury could not find (for defendant on) the issue of fraudulent representations," was correct. It is difficult to see how there was any question of intent not to keep a promise there involved. On the contrary, as making it clear there was not any question of intent not to perform, the court said: "A fraudulent representation to vitiate a contract *induced* (italics are ours) by it is a representation of a past or existing fact, but a promise is not a representation, and when not a part of the contract does not affect it." As we understand this pronouncement, a promise that is contingent on some future event is not part of a contract, but we know of no rule that says that an unconditional promise to perform a certain thing in the future is not, when supported by a proper consideration, either a contract in and of itself or part of some contract which it intends to induce. But whatever possibly may be thought about this, it is impossible to see what the above three cases had to do with the question decided by the instant case.

The headnote in Miller v. Sutliff, 241 Ill. 521, 89 N. E. 651, 24 L. R. A. (N. S.) 735, also referred to by instant case, says: "A conveyance of a half interest in the coal and minerals underlying the grantor's land made on the faith of a representation that the grantee will locate manufacturing plants on or near the property and secure railroad communication therewith, which promise was not intended to be, and was not, performed, does not entitle the grantor to a cancellation of the conveyance on the ground of fraud." It must be admitted that this is support for the instant case, if the case bears out this headnote.

Looking at the facts, however, we find it stated that all of the above would be done "if defendants could find and obtain in sufficient quantities a suitable kind of coal." But independently of this it is said: "If an intention not to perform constituted fraud, every transaction might be avoided, where the facts justified an inference that a party did not intend to pay the consideration or keep his agreement. A mere breach of a contract does not amount to a fraud, and neither a knowledge of inability to perform, nor an intention not to do so would make the transaction fraudulent."

As we understand this, the law will not unravel the intent of a promissor, where he has promised unconditionally to do certain things in the future, because the promissee has taken as sufficient consideration the promise itself, secret intent not changing the status either of promissor or promisee.

In Kelty v. McPeake, 143 Iowa 507, 121 N. W. 529, the lease given in consideration of a promise was canceled, but this was because defendant made false reresentations of his financial condition at the time he obtained same, and it is stated that a mere promise of future performance will never justify a rescission, it having once been accepted as consideration. There is little or no discussion.

The figure that a promise may cut in a suit for rescission would seem to be not when the promise is the consideration of the contract sought to be rescinded, but when it is the inducement for the acceptance of the consideration. But even in the latter case the statement to amount to a promise must be something more than the mere expression of future intention. Music Co. v. Bridge, 134 Wis. 510, 114 N. W. 1108. This case refers to Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992, where as an inducement to the giving of an order for a soda water fountain, manufacturer's agent promised orally not to sell any fountain of that make to anyone else on the same street, vendees relying on this promise and the agent intending to break and actually breaking it. The court said: "Such alleged false representation did not relate to any existing fact *in presenti*, but only to future sales. Such false promise was no ground for avoiding the written contract. It is entirely unlike a case where a merchant orders goods, knowing himself to be insolvent, without disclosing his insolvency, with the preconceived purpose of not paying for them at all. In such case the existing fact of known insolvency is the important factor. If it was his "preconceived purpose" it cut no figure, and what the court says about representations not amounting to an existing fact is owing to what one may deem to be an existing fact. A binding promise seems to be an existing fact, but, then, one may have his right of action for breach thereof, and recover for damages therefrom. Recoupment, instead of rescission, would seem to have been defendant's remedy.

In Braddy v. Elliott, 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N. S.) 1121, 125 Am. St. Rep. 52, the court goes upon the theory that fraud in procuring the execution of a contract generally entitles one to other remedy, at his election, than by an action in damages for its breach. If the fraud consists in a fraudulent promise to do something in the future, e. g., with no in-

tention to perform, it was said: "Under such circumstances equity will relieve the promisee." Speaking to the case at bar it was said: "If a jury should find that this defendant took advantage of the plaintiffs by making promises which he did not intend fully and faithfully to perform, it is such fraud in law as entitles them to cancel the contract and deeds, to recover the original property," etc., etc.

In Adams v. Gillig, 115, N. Y. Supp. 999, 131 App. Div. 494, it was held by a majority of 3 to 2, that, where a proposed grantee had a present and existing intention to place an automobile garage on the lot he was buying, and specifically represented that he intended to use it for dwelling houses and for no other purpose, there was a fraudulent misrepresentation of an existing fact authorizing rescission at the suit of grantor. The court said: "Our judgment is that the law in this state is that fraud cannot be founded solely upon a promise not performed, even if the promissor never intended to fulfill the same. (See Kley v. Healy, 127 N. Y. 61). The question here is slightly different, however. This statement was in no sense a promise. It was a statement of a *present, existing intent*, and we see no reason why it was not as much an existing fact as any other fact that could be made the basis of a charge of fraud. The purpose of the statement was to deceive and defraud, and it accomplished its purpose." This seems not forcible reasoning because it could be answered by defendant, that he told the truth and afterwards changed his mind. The North Carolina court is on safer ground in holding that fraudulent inducement gives the right to rescind.

In Southwestern Loan & Trust Co. v. Gessendaner, Ala. App., 58 So. 739, the doctrine is stated to be that: "While it is true that a mere unfulfilled promise will not furnish a legal ground for avoiding a contract made upon the faith of the unfulfilled promise, nevertheless, where a party leads another into a contract by making him a promise, which he has no intention at the time of performing, such a promise constitutes a fraud, and for such fraud the contract so entered into may be rescinded." This case cites a number of prior decisions by Alabama courts.

In Harrington v. Rutherford, 38 Fla. 321, 21 So. 283, after holding that ordinarily a promise to do something in the future, though made as a representation to induce another to enter into a contract, gives no right of rescission because of its nonfulfillment, the court said, speaking of the case at bar, that, if there was no intention at the time of performing the promise and it was made as a mere pretense to induce delivery of the deeds sought to be canceled" a different question would be presented."

In Witt v. Cuenod, 9 N. M. 143, 50 Pac. 328, it was said that the promise inducing a contract will not authorize rescission unless it was deceitfully or fraudulently made.

In Langley v. Rodriguez, 122 Cal. 580, 55 Pac. 406, 68 Am. St. Rep. 70, there was an oral promise in a contract for the sale of a crop that the buyer would make an advance payment on the contract, and the principal of the agent so promising, it was held that there could be rescission because of the contract being thus induced when the agent had no reasonable ground to believe his principal would make such payment.

The authorities *pro* and *con* on this question are collected in an extended note in 10 L. R. A. N. S. 640, and it is doubted upon which side is the weight of decision, when the promise inducing a contract is merely an instrument of fraud. For ourselves we see no reason for preventing rescission, except the difficulty in the way of proof, and inasmuch as actions are never brought unless there has been default in performance or such inability at the time to comply in the future as to make a promise partake of recklessness, it is no hardship to apply the rule of fraud to a promissor in either situation.

C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS — WHEN AND WHERE TO BE HELD.

AMERICAN BAR ASSOCIATION — Montreal, Canada, September 1, 2 and 3, 1913.

ARIZONA—Phoenix, some time in November.

CALIFORNIA—San Diego, November 23.

MISSOURI—Kansas City, September 24, 25 and 26.

NEVADA—Reno, October 31.

NORTH DAKOTA—Mandane, some time during September, 1913.

OREGON—Portland, November, 1913.

VERMONT—Montpelier, October 7, 1913.

RHODE ISLAND—Providence, December 1, 1913.

MEETING OF MISSOURI BAR ASSOCIATION.

The thirty-first annual session of the Missouri Bar Association will be held at Kansas City, Missouri, on Wednesday, Thursday and Friday, September 24th, 25th and 26th, 1913.

Hon. Ralph F. Lozier of Carrollton, Missouri, president of our association, has the absolute promise that the following speakers will be present and deliver addresses:

Hon. Horace E. Deemer, chief justice of the Iowa supreme court.

Hon. N. Charles Burke, associate justice of the Maryland court of appeals, and Hon. Samuel Untermeyer, the well-known counselor of New York city.

We are almost sure to have with us, in addition to the three named, Hon. Charles J. Doherty, minister of justice, Ottawa, Canada, and one or more of the following gentlemen:

Mr. William Draper Lewis, dean of the law department, University of Pennsylvania.

Mr. W. R. Vance, dean of the law department, University of Minnesota, and Mr. S. S. Gregory, ex-president American Bar association.

As usual, all of the circuit courts of Missouri will stand adjourned during the session of the association.

As soon as the program has been completed a copy will be mailed to you, but you can rest assured that it will be up to the standard of the past few years.

The Kansas City Bar association is laying plans for your entertainment and a general good time will be had by members attending.

The annual banquet will be held on Friday night at one of the Kansas City hotels.

The program committee is arranging to devote at least one day to the discussion of reports and a great part of that time will be given to the report of the committee on reform or judicial procedure.

We earnestly hope that you will arrange to be present at this session.

Very truly yours,

JOHN G. SCHAICH,
Secretary.

310 Commerce building,
Kansas City, Missouri.

CORRESPONDENCE.

ISSUE OR ISSUANCE?

Editor Central Law Journal:

The word, issuance,—now in legal as well as popular use,—is, evidently, the outgrowth of the word, issue. When and through whose agency did issuance first appear in print? Issuance will not be found in the old or older legal literature of the law—in Termes de la Ley, Finch's Law, Blackstone, Chitty or Kent. It is not in Walker's Pronouncing Dictionary, London folio edition of 1806. It is not in Webster's Dictionary, Unabridged, edition of 1860. It will not be found in English literature prior to 1860. It appeared in the Universal Dictionary, edition of 1897.

I have no recollection of having seen issuance in print or heard it in popular use until after the Civil War. My impression is that I first observed it in legal literature—perhaps in a decision of our Missouri Supreme Court.

Why continue the use of issuance? It has no meaning not embraced in issue. It has an extra syllable. It is not so nice in looks or sound as issue. It was of fortuitous or unscholarly birth. Why not all decide for the "old paths, where is the good way, and walk therein," eschewing issuance, and use issue only, as the fathers did? D. C. ALLEN.

Liberty, Mo.

BOOK REVIEWS.

MAGEE ON BANKS AND BANKING—SECOND EDITION.

This book, in one volume, succeeds a first edition sent forth in 1906, being a considerable enlargement of the former work, because of new laws and new decision in regard to the relation of banking to the public and' its control under the police power.

The work treats of banks in their varied functions and their restrictions and limitations and of their classification as state and national institutions and of savings banks and trust companies and of clearing houses as facilities employed by them in the transaction of their affairs.

The treatment by the author is orderly in arrangement, such as to make the work readily usable, and citation of authority is abundant, opinions of courts often being freely quoted from, and generally the text being so very explicit as to avoid detailed explanation in notes thereto.

The volume exceeds 1,000 pages, with an appendix of the National Bank Act and acts amendatory thereof and supplementary thereto, compiled by Comptroller of Currency, is of superior typographical execution, bound in law buckram and published by Matthew Bender & Co., Albany, N. Y., 1913.

HUMOR OF THE LAW.

Lawyer (to judge)—"I admit that my client called the plaintiff an ox, but, seeing the price of meat, I consider that rather as a compliment than an insult."

The taxicab driver was about to receive his sentence.

"Prisoner," said the judge, "I am satisfied there is no reasonable doubt of your guilt. The evidence shows that you drove the deceased about the city in your taxicab for two hours, then took him to a secluded place and strangled him and stole his watch. Have you anything to say before sentence is pronounced?"

"Yes, your honor."

"What is it?"

"I'd like to know, your honor, who is going to pay the cab hire?"

A Swede was being examined in a case in a Minnesota town where the defendant was accused of breaking a plate-glass window with a large stone. He was pressed to tell how big the stone was, but he could not explain.

"Was it as big as my fist?" asked the nervous judge, who had taken over the examination from the lawyers, in the hope of getting some results.

"It ban bigger," the Swede replied.

"Was it as big as my two fists?"

"It ban bigger."

"Was it as big as my head?"

"It ban about as long, but not so thick," replied the Swede, amid the laughter of the court.—Saturday Evening Post.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Arbitration and Award**—Setting Aside.—Partiality, interest, or relationship of an arbitrator with reference to the other parties to the arbitration is not ground for setting aside the award, where the arbitrator is selected by the parties with full knowledge of such facts.—State v. Bowlby, Wash., 132 Pac. 723.

2. **Assignments**—Action for Negligence.—Where an error in a telegram ordering machinery caused the delivery of the wrong kind, which was practically worthless at the point sent, the buyer on paying therefor may, if the transaction is bona fide, take an assignment of the seller's right and enforce them against the telegraph company—Jackson Lumber Co. v. Western Union Telegraph Co., Ata. App. 62 So. 266.

3. **Attorney and Client**—Burden of Proof.—A duly licensed and practicing attorney's authority is presumed until challenged, and the burden of disproving it is on the party questioning it, except where the client denies the authority, when the burden is on the attorney.—Riley v. O'Kelly, Mo., 157 S. W. 566.

4.——Settlement by Client.—Where a client compromises his case and settles it with or without the consent of his attorneys, the amount of the fee will be liquidated by such settlement.—Belch v. Schott, Mo., 157 S. W. 658.

5. **Bankruptcy**—Preference.—Irrespective of Bankr. Act June 25, 1910, § 11, which expressly makes the intent of the debtor immaterial, facts held to show a preference from a transfer where both parties had reason to believe that it was an advantage to the creditor, even though they had no actual intent to grant a preference, or actual knowledge of the debtor's insolvency in fact.—Wilson v. Mitchell-Woodbury Co., Mass., 102 N. E. 119.

6. **Bills and Notes**—Accommodation Indorser.—One who signs a note at the request and for the benefit of the payee is in effect an accommodation indorser, and is not liable to the payee on the notes, unless a separate consideration was given for the indorsement.—Cowan v. Hudson, Miss., 62 So. 275.

7.——Condition Subsequent.—A note, supported by a sufficient consideration may be conditioned upon its being extinguished by a condition subsequent, specified therein.—Miller v. Slater, Wis., 142 N. W. 124.

8.——Consideration.—A stockholder in a corporation is not bound to pay its debts, and a note given by him therefor is without consideration.—Richards v. Levison, N. Y. 142 N. Y. Supp. 272.

9.——Contributor.—Where one of the indorsers liable on a note under an oral agreement has paid, his remedy against the other indorsers is an action for contribution, and not an action on the note.—Shea v. Vahey, Mass., 102 N. E. 119.

10.——Extending Time.—A promise by the holder of notes after their maturity to extend the time of payment on an agreement by the makers to apply thereon the proceeds of certain securities already pledged for their payment held not enforceable for want of consideration.—Knotts v. Virginia-Carolina Chemical Co., U. S. C. C. A., 204 Fed. 926.

11. **Brokers**—License.—That plaintiff has not taken out a state license to engage in the real estate business, as required by the revenue laws, would not invalidate a contract by him to sell land on commissions—Alford v. Creagh, Ala. App., 62 So. 254.

12. **Carriers of Goods**—Discrimination.—Under the statute it is the duty of common carriers to observe equality in freight rates to all shippers similarly circumstanced for the transportation of goods the same distance.—Sullivan v. Minneapolis & R. R. Co., Minn., 142 N. W. 3.

13.——Just Compensation.—Just compensation secured by the Constitution of the United States does not mean a guaranty to a carrier as against the public of any fixed percentage of profit on an investment.—Lehigh Valley R. Co. v. United States, U. S. Com. C., 204 Fed. 986.

14.——Rebate.—A contract by which a railroad company leased premises to a shipper for less than their rental value, as a means of granting to the lessee a rebate or concession from its published rates, held invalid.—Cleveland, C., C. & St. L. Ry. Co. v. Hirsch, U. S. C. C. A., 204 Fed. 849.

15. **Carriers of Passengers**—Boarding Car.—One who attempts to enter a car which has been slowed down by the motorman upon his signal to a speed of two miles per hour becomes a passenger.—Nolan v. Metropolitan St. Ry. Co., Mo., 157 S. W. 637.

16.——Ejection.—Where excessive force is used, it is unnecessary to determine whether plaintiff was rightfully on the train or not.—Bottstein v. Erie R. Co., N. J., 87 Atl. 94.

17. **Chattel Mortgages** — Subrogation.—A judgment creditor of a chattel mortgagor, as to whom the mortgage was fraudulent and void, could not claim any rights in a judgment of

replevin rendered in favor of the mortgagee against the receiver of the mortgagor for the chattels or the unpaid mortgage debt, nor in an appeal bond executed by such receiver.—Hundley Dry Goods Co. v. Albien, S. D., 142 N. W. 49.

18. **Commerce**—Soliciting Orders.—A contract made with a foreign corporation for soliciting orders for books published by the corporation, to be imported into Missouri and delivered by the company's agent direct to the subscribers ordering them, related to interstate commerce.—Security State Bank v. Simmons, Mo., 157 S. W. 585.

19. **Contracts**—Architects.—In the absence of fraud or mistake, held, that the decision of the architect and construction board that certain items of work were required by the specifications and were not extras was binding on the contractor and subcontractor.—Caldwell & Drake v. Pierce, Ky., 157 S. W. 692.

20.——Consideration.—A partial payment of a past due debt is not a consideration to support an agreement extending the time of payment of the debt.—Black v. Slocumb Mule Co., Ala. App., 62 So. 308.

21.——Practical Construction.—The practical interpretation given contracts by the parties thereto before any controversy has arisen will generally be enforced.—Cady v. Travelers' Ins. Co., Neb., 142 N. W. 107.

22.——Performance.—Unexpected difficulties which a contractor encounters in the performance of a particular piece of work at a stated price does not excuse him from the obligation of his contract.—Coal & Iron Ry. Co. v. Reherd, U. S. C. C. A., 204 Fed. 859.

23.——Statute of Frauds.—A stipulation in a written contract requiring changes to be made in writing did not prevent the parties from terminating such contract and making a new verbal contract, where neither the old nor the new contract was within the scope of the statute of frauds.—Tilley v. Bartow, Ala. App., 62 So. 330.

24. **Corporations**—Common Directors.—Where a fish club corporation, being unable to renew a lease of its grounds, sold its property for full value to another corporation having the same directors, plaintiff, in the absence of proof of actual fraud, could not have the conveyance vacated on the theory that the directors were trustees and in effect sold to themselves.—Cummings v. Parker, Mo., 157 S. W. 629.

25.——Expiration of Charter.—Upon the expiration of a corporation, the legal title to its land passes by operation of law to the stockholders, who were the beneficial owners through the corporation.—Gasque v. Ball, Fla., 62 So. 215.

26.——Liability of Stockholders.—One seeking to enforce the liability of corporate officers under a statute imposing a liability must allege and prove every fact, default, or contingency on which the right to recover depends.—J. L. Mott Iron Works v. Arnold, R. I., 87 Atl. 17.

27.——Pool.—A pooling contract by tobacco growers, whereby each agreed to subscribe for stock in a corporation to be formed, and whereby they authorized an incorporated society, organized to promote the interests of tobacco growers, to pay for the stock out of the proceeds of tobacco when sold, does not authorize the incorporators to create a voting trust.—Lebus v. Stansifer, Ky., 157 S. W. 727.

28.——Promoters.—The members of a committee appointed by the directors of a proposed corporation to arrange for stationery and fixtures for the corporation are not personally liable for stationery ordered from a seller knowing the facts, though the corporation was never organized.—McQuiddy Printing Co. v. Head, Ala. App. 62 So. 287.

29.——Salary.—Where the secretary of a corporation, entitled by resolution of the directors to a salary of $600 a year, and additional compensation, not exceeding $400, as fixed by the president, drew $50 a month, and the additional compensation at the end of the year, the secretary, acting under a re-election silent as to compensation, and being lawfully discharged three months thereafter, was entitled only to $50 a month during the months he acted.—Eicks v. Wittemann Co., 142 N. Y. Supp. 190.

30.——Voting on Stock.—A contract for the separation of the power to vote stock from its ownership is against public policy.—Thomas Maddock, Sons' Co. v. Biardot, N. J. Ch., 87 Atl. 66.

31. **Costs**—Stenographer.—An agreement between the parties that the fees of a stenographer taking testimony before a referee shall be taxed as costs is binding.—Hertzberg v. Elvidge, 142 N. Y. Supp. 211.

32. **Covenants**—Breach.—A covenant of seisin is broken when the covenantor without title delivers the deed.—Veit v. McCauslan, 142 N. Y. Supp. 281.

33. **Criminal Law**—Election.—Where the state's evidence tended to show defendant guilty of each of several offenses charged in the alternative in a single count, accused was entitled to compel the state to elect on which it would rely before putting in his defense.—Warrick v. State, Ala. App., 62 So. 342.

34.——Expert Testimony.—One who has lived close to a store, and who knows where decedent was killed, and is familiar with the surroundings, may give his opinion as to whether the light from the store on a dark night will light up the place where decedent was killed; his opinion being a statement of fact based on actual knowledge.—Key v. State, Ala. App., 62 So. 335.

35.——Intent.—In a prosecution for fraudulently altering the brand of an animal, an extra judicial confession is admissible upon proof that the brand was changed under circumstances indicating a fraudulent intent.—Daughtry v. State, Fla., 62 So. 345.

36.——Successive Punishment.—Where accused was convicted on two counts of violating the White Slave Traffic Act, and was sentenced to a year's imprisonment on the first count and to six months on the second count, to run successively, the court properly ordered the sentence to be served in a state penitentiary, under Rev. St. § 5541 (U. S. Comp. St. 1901, p. 3721), authorizing such imprisonment in cases of sentence for a longer term than one year.—Thompson v. United States, U. S. C. C. A., 204 Fed. 973.

37. **Damages**—Loss of Earnings.—Where the

evidence, admitted without objection in support of the petition, alleging permanent disability to labor, showed that plaintiff kept a rooming house, that after her injuries she could not carry on her business, and that a third person, who was in the house, took care of her and of the house, the question of loss of earnings was properly submitted to the jury.—King v. City of St. Louis, Mo., 157 S. W. 498.

38.——Measure of.—The measure of damages for breach of contract to deliver lumber where the seller offers to deliver, but only on payment made before contract time, is the interest upon such payment from the time of payment under such offer to the contract time of payment, the buyer being bound to minimize damages for the breach of contract, even if he has to deal with the seller.—N. B. Borden & Co. v. Vinegar Bend Lumber Co., Ala. App., 62 So. 245.

39. **Deeds**—Habendum Clause.—The rule that the habendum clause of a deed yields to the granting clause, when repugnant, does not apply where the intention of the parties can be ascertained with reasonable certainty from the whole instrument.—Culpeper Nat. Bank v. Wrenn, Va., 78 S. E. 620.

40. **Descent and Distribution**—Indebtedness of Distributee.—The children of a son who died before the intestate, his father, and who took as representatives of their parent, were not entitled to a distributive share in the estate, where a note exesuted by the parent and not collectible by the estate was in excess of the distributive share.—Adams v. Yancey, Miss., 62 So. 229.

41. **Domicile**—Husband and Wife.—As a wife's domicile may be separate from her husband, his act in giving the residence of his wife in a pleading is not a recognition of the fact that his own residence is there.—Holyoke v. Holyoke's Estate, Me., 87 Atl. 40.

42. **Ejectment**—Common Source of Title.—Where in ejectment the parties rely upon the title of a common ancestor or grantor, whether he had title is not in issue; the only issue being which party acquired his title.—Riley v. O'Kelly, Mo., 157 S. W. 566.

43.——Common Source of Title.—Where the parties in ejectment do not claim under a common ancestor, plaintiff can only recover on a fee-simple title good against the world.—Chaput v. Pickel, Mo., 157 S. W. 613.

44. **Employers' Liability Act**—Damages.—In an action under the federal Employer's Liability Act by the parents of a deceased adult son, evidence as to his previous contributions and his recognition of their dependency held admissible.—McCoullough v. Chicago R. I. & P. Ry. Co., Iowa, 142 N. W. 67.

45. **Evidence**—Adverse Presumption. — The failure of a party to call an employe as a witness held not to justify an inference that his testimony would have been prejudicial to his employer.—Iowa Cent. Ry. Co. v. Hampton Electric Light & Power Co., U. S. C. C. A., 204 Fed. 961.

46.——Admissibility.—Where, in a written contract for the sale of machinery, the time of delivery was left blank, parol evidence was admissible to show the agreement thereon.—Stephens-Adamson Mfg. Co. v. Bigelow, N. Y. Supp. 87 Atl. 74.

47.——Mailing Letter.—The general rule that it will be presumed that a letter addressed, stamped, and mailed was delivered in due course does not apply to a notice of taking depositions for the establishment of a bill of exceptions mailed to a solicitor who has no opportunity to deny its receipt.—Cleghorn v. State, Ala. App., 62 So. 329.

48.——Presumption.—Where there were no eyewitnesses to an accident at a railroad crossing by which plaintiff's intestate was killed, it may be inferred from the instinct of self-preservation that deceased used all ordinary care at the time of the accident, but this presumption may be rebutted.—Wilson v. Chicago, M. & St. P. Ry. Co., Iowa, 142 N. W. 54.

49.——Stated Account.—Proof of an admission by a debtor that a fixed sum is due, which was claimed of him on an account by the creditor, supports a count on a stated account, though the admission was made in response to the assertion of a claim by the creditor, unaccompanied by a statement of the items comprising the account.—Smith v. Allen, Ala. App., 62 So. 296.

50. **Executors and Administrators**—Personal Liberty.—One executor cannot employ an attorney and have his fees charged against the estate after the others have employed a different attorney, who performs all necessary services.—In re Dunlop's Estate, 142 N. Y. Supp. 286.

51. **Fixtures**—Impairing Security.—An agreement by a lot owner holding subject to a purchase-money mortgage that plaintiff might erect a house on the lot which should not become a fixture held not to impair the mortgage security, nor give the mortgagee any interest in the house subsequently erected.—Roberts v. Caple, Ala. App., 62 So. 343.

52.——Owner and Seller.—The owner of land and the seller of personal property may ordinarily make any agreement they may choose regarding personalty to be annexed to the land, although as to a third person, such as a purchaser or a mortgagee, it may become a fixture.—Snouffer & Ford v. City of Tipton, Iowa, 142 N. W. 97.

53. **Fraud**—Husband and Wife.—A husband's transfer to his wife of a contract for the purchase of certain real property, which he had been induced to purchase by fraudulent representations, held not to transfer to the wife the husband's right of action for fraud.—Fox v. Hirschfeld, 142 N. Y. Supp. 261.

54——False Representations—Where the presentation of that which is true creates a false impression, it is, as to him who, knowing of the misapprehension, seeks to profit by it, a case of false representation.—Melick v. Metropolitan Life Ins. Co., N. J. Sup. 87 Atl. 75.

55. **Frauds, Statute of**—Memorandum.—A memorandum of agreement for the sale of real estate which referred to a deed executed by the vendor to be delivered upon making the payment specified in the memorandum held sufficiently to satisfy the statute of frauds.—Shelinsky v. Foster, Conn., 87 Atl. 35.

56.——Original Promise.—A promise to pay a certain sum on payment of a mortgage transferred to plaintiff held not a promise to pay the debt of another, but a contract to pay defend-

ant's own debt, and was not within the statute of frauds.—Plott v. Foster, Ala. App., 62 So. 299.

57. **Fraudulent Conveyances**—Bulk Sales.—That the seller of a stock of merchandise in bulk omits to name one of his creditors, and the purchaser fails to give that creditor notice of sale, will not render the sale void, even in part, though such creditor does not in fact have notice, and though the seller is insolvent, where the purchaser otherwise complies with the statutory requirements, and acts in good faith, and pays over to the seller the purchase price agreed on.—International Silver Co. v. F. G. Hull & Co., Ga., 78 S. E. 609.

58.——Burden of Proof.—Where the owner of a stock of goods transferred the same in payment of a debt with intent to defraud her other creditors, the burden was on the grantee to prove, not only that he was a purchaser for value in good faith, but that he had no notice or knowledge of facts which put him on inquiry as to grantor's intent.—Tromer v. Bader, 142 N. Y. Supp. 206.

59. **Gifts**—Definition.—To constitute a gift inter vivos, there must be an unqualified completion and dominion in praesenti over the property by the donee, without any element of contemplation of death.—Miller v. Slater, Wis., 142 N. W. 124.

60. **Homicide**—Self-Defense. — Where there was evidence that defendant killed deceased without necessity for so doing, in self-defense, the killing would not be justifiable, though deceased was at fault in bringing on the difficulty. —Guffey v. State, Ala. App., 62 So. 293.

61.——Self-Defense.—Though murder in the second degree is presumed from the simple fact of the willful killing of one man by another, such presumption does not prohibit defendant from showing that in such killing he acted in self-defense.—State v. Larkin, Mo., 157 S. W. 600.

62. **Husband and Wife**—Maintenance.—Where a husband so mistreats his wife as to make her condition intolerable, justifying the granting of a divorce to her, she may leave her husband's home and sue for maintenance.—Grant v. Grant, Mo. App., 157 S. W. 673.

63.——Suretyship.—A married woman cannot bind herself as surety or guarantor for the debts of her husband or for a third person, her personal liability on contracts being restricted to those made for her own use and benefit or for the use and benefit of her separate estate. —Goldsmith Bros. Smelting & Refining Co. v. Moore, Ark., 157 S. W. 733.

64. **Indictment and Information**—Counts.—Altering the marks and changing the brands of an animal, being separate offenses, cannot be embraced in the same count of an indictment.—Stokes v. State, Fla., 62 So. 345.

65.——Disjunctive Averments.—When in one count several distinct offenses in the alternative are charged, each disjunctive averment must allege an offense or the indictment is bad in toto.—Williams v. State, Ala. App., 62 So. 294.

66. **Insurance**—Forbidden Avocation.—For an insured to assist in bottling aged whisky, where the operations were conducted in a government warehouse, will not avoid a certificate of life insurance issued by a mutual benefit association whose by-laws provided that the certificate of any member engaged in the manufacture or sale of intoxicating liquors was and should be void.—Bracket v. Modern Brotherhood of America, Ky., 157 S. W. 690.

67. **Interest**—Instalment Payments.—Where a contract to furnish brick for the construction of a sewer, which was expected to take considerable time, provided for payments after each certification by the supervising engineer, the account drew interest from the date of each certification.—Siebert v. Dunn, 142 N. Y. Supp. 253.

68. **Landlord and Tenant**—Dispossession.—The landlord's affidavit, in proceedings to dispossess a tenant for nonpayment of rent, must show that the rent reserved was a sum certain or capable of being reduced to certainty, both as to amount and time of payment.—Home Circle Realty Corporation v. Giesenhaus, N. J. Sup. 87 Atl. 78.

69.——Licensee.—Customer of tenant conducting a grocery store, who left the store by the rear door not intended as a means of access, held to be a mere licensee as to the owner, and hence the owner was not liable for injuries sustained in falling down a stairway, in the absence of any act of active mischief.—Bender v. Weber, Mo., 157 S. W. 570.

70. **Libel and Slander**—Libel per se.—A newspaper article, stating that plaintiff's wife committed suicide, owing to her weak and nervous condition, induced by the care of a house and large family, is not libelous per se, in charging that plaintiff failed in his duty as a husband, and this indirectly caused her suicide.—Goldwasser v. Jewish Press Pub. Co., 142 N. Y. Supp. 188.

71.——Professional Skill.—Where an alleged libelous publication of an article concerning plaintiff's preparation of certain alleged defective plans for the city of New York did not charge plaintiff with lack of professional skill and discretion, and was not libelous per se, the complaint, charging no special damages, was demurrable.—Potter v. Pictorial Review Co., 142 N. Y. Supp. 208.

72. **Limitation of Actions**—Lis Pendens.—Where contractors who laid a pavement were refused payment on the ground that it was not in compliance with the contract and were defeated in actions for the contract price and on the quantum meruit, the pendency of those actions tolled the statute of limitations as to their right to remove the pavement.—Snouffer & Ford v. City of Tipton, Iowa, 142 N. W. 97.

73.——Statutory Right of Action.—The time fixed by statute for the commencement of an action unknown at common law is a condition of the liability and right of action thus created, and not a statute of limitations.—Partee v. St. Louis & S. F. R. Co., U. S. C. C. A., 204 Fed. 970.

74. **Lis Pendens**—Diligence.—The prosecution of a suit with reasonable diligence is essential to the continued operation of the law of lis pendens, and the benefit of a lis pendens may be lost by an unusual or unreasonable delay which is not satisfactorily explained or accounted for. —Roberts v. Cardwell, Ky., 157 S. W. 711.

75. **Master and Servant**—Assumption of Risk.

—An inexperienced workman assisting fellow workmen under the directions of the foreman in loading on a car by hand a timber 20 feet long and weighing between 800 and 1,400 pounds did not assume, as a matter of law, the risk of injury resulting from the method adopted.—Olson v. Carlson, Wash., 132 Pac. 721.

76.——Incompetent Fellow Servant.—A master is not liable for injuries arising from the incompetency of a fellow servant, unless he knew of such incompetency or could have known thereof by the exercise of reasonable diligence, and in spite of such knowledge retained the servant in his employ.—Allen v. Quercus Lum-

77.——Master's Knowledge.—An employer is presumed to know the dangers both latent and obvious arising from performance of the duties imposed upon employees.—Kingan & Co. v. Foster, Ind., 102 N. E. 108.

78.——Workmen's Compensation Law.—Under Workmen's Compensation Act of 1911, where several fingers are injured in the same accident, the total award is properly composed of separate awards for the injury to each finger as fixed by statute, not to exceed the amount provided for the loss of a hand, and the weekly payments in such case do not run concurrently.—George W. Helme Co. v. Middlesex Common Pleas, N. J., 87 Atl. 72.

79. **Mechanics' Liens**—Attorney Fees.—The attorney's fees allowable in mechanics' lien cases should correspond in part to the amount of the lien, and therefore, where a mechanic's lien is on appeal reduced more than three-fourths, a corresponding reduction should be made in the fee.—Culbert v. Lindvall, Wash., 132 Pac. 729.

80.——Notice.—Mere knowledge on the part of the owner that repairs and improvements were being placed upon his building which he had demised under lease providing that the lessee alone should be liable for such improvements is not sufficient to render him liable to materialmen for the value thereof on the theory of equitable estoppel.—Hickman v. Freiermuth, Cal., 132 Pac. 772.

81. **Mortgages**—Compounding Crime.—Where the stockholders of a bank were notified by an attorney that the banking laws had been violated by the officers becoming indebted to the bank, but that, if each would repay, he believed no prosecution would be had, a mortgage executed by an officer and his wife on her property to secure his debt to the bank was not executed to compound a criminal prosecution.—Maddox v. Rowe, Ky., 157 S. W. 714.

82.——Construction.—Where there is uncertainty, ambiguity, or inconsistency in the stipulations contained in a note and the mortgage securing same in respect to the mater of accelerating the maturity of the principal debt, the court should, if possible and consistent with the intention of the contracting parties, give effect to the provisions of both.—Clark v. Paddock, Idaho, 132 Pac. 795.

83. **Municipal Corporations**—Abutting Owner.—A city is liable to an abutting lot owner for any damage inflicted on him by grading a street from its natural to a lower grade, where no prior grade has been established at that point.—Stocking v. City of Lincoln, Wash., 142 N. W. 104.

84.——Permits.—Permission granted by city officials to a lot owner to construct a walk above the established grade, leaving a drop at the end, held not negligence in adoption of a defective plan, or, if it was, so obviously dangerous as to render the city liable for injuries caused thereby.—Robinson v. City of Oconto, Wis., 142 N. W. 125.

85. **Negligence**—Contributory Negligence.—One is guilty of contributory negligence only where he fails to use ordinary or reasonable care to avoid injury.—Kingan & Co. v. Foster, Ind., 102 N. E. 103.

86.——Pleading.—In an action for negligence for breach of a duty owed by defendant, the complaint need not specify the manner of the breach, but if it attempts to the plaintiff is bound thereby; and the sufficiency of the complaint must be tested by the sufficiency of the particular allegations.—Virginia-Carolina Chemical Co. v. Mayson, la., 62 So. 253.

87.——Statutory Violation.—Where a statute created a duty, a violation of such duty, which is the proximate cause of any injury to one to whom it is owing, creates a liability in his favor, provided he is not guilty of negligence contributing to such injury.—Steiert v. Coulter, Ind., 102 N. E. 113.

88. **Partnership**—Partner's Interest.—A transfer by a partner of only his interest in the partnership property merely entitles the transferee to receive such partner's share of what may remain after a settlement of the partnership affairs and the payment of the partnership debts.—Planters' Trading Co. v. Moore, la., 62 So. 302.

89. **Perpetuities**—Limitation Over.—A limitation over in case all of testator's son's children or grandchildren die without leaving any lawful issue, not being limited to a life or lives in being and 21 years after, is within the rule against perpetuities, and void.—Merkel v. Capone, N. J., 87 Atl. 95.

90. **Physicians and Surgeons**—Unnecessary Pain.—In an action against a physician for malpractice, damages for unnecessary pain suffered because of the unskillful treatment may be recovered.—Stanley v. Taylor, Iowa, 142 N. W. 81.

91. **Principal and Agent**—Personal Liability.—One who is fully cognizant of the facts touching the authority of an agent with whom he deals cannot hold the agent liable on a contract by which he did not consent to be personally bound.—McQuiddy Printing Co. v. Head, Ala., 62 So. 287.

92. **Quieting Title**—Accounting for Damages.—In an action to quiet title, the court may require an accounting for damages to the land when no rule of law or procedure is thereby substantially violated; and the propriety of such accounting may depend on the allegations of fact in a particular case.—Gasque v. Ball, Fla., 62 So. 215.

93.——Adverse Possession.—A fence three feet high and consisting of two strands of wire, though insufficient to turn stock, held sufficient to indicate possession so as to support an action to quiet title under the McEnerney act.—Larsen v. All Persons, Cal., 132 Pac. 751.

94.——Common Source of Title.—Where in actions to quiet title the parties rely upon the

title of a common ancestor or grantor, whether he had title is not in issue; the only issue being which party acquired his title.—Riley v. O'Kelly, Mo., 157 S. W. 566.

95 **Railroads**—Contributory Negligence.—A traveler on a highway, who is so intoxicated as to be incapable of exercising ordinary care for his own safety, will be deemed guilty of contributory negligence defeating a recovery for injuries sustained by being struck by a train at a crossing.—Cincinnati, N. O. & T. P. Ry. Co. v. Reed, Ky., 157 S. W. 721.

96.——Crossings.—While a traveler must look and listen for approaching trains, he may assume upon approaching a crossing that the railroad company will give the usual warnings, and will exercise the care required of it in approaching such dangerous places.—Wilson v. Chicago, M. & St. P. Ry. Co., Iowa, 142 N. W. 54.

97.——Highways.—The state has power to require railroad companies to restore highways crossed by them to such condition that the proper use of the street will not be interfered with, though it requires a separation of the grades.—American Tobacco Co. v. Missouri Pac. Ry. Co., Mo., 157 S. W. 502.

98.——Licensee.—Plaintiff, a boy of 12, sent to defendant's station to meet a passenger, who was to arrive, and to receive certain tickets from him; held a mere licensee, who took the risk of an accident in using the premises in the condition in which they were.—Bullock v. New York Cent. & H. R. R. Co., 142 N. Y. Supp. 219.

99.——Service of Process.—There is no presumption of agency to receive service of process for a foreign railroad corporation, and, where service is made on a person represented to be its agent, the return is not conclusive of the fact that the person served was its agent.—Pecos & N. T. Ry. Co. v. Cox, Tex., 157 S. W. 745.

100. **Receivers**—Right to Sue.—A receiver appointed by a state court, without more, had no authority to institute a suit in a federal court sitting in another state.—Coal & Iron Ry. Co. v. Reherd, U. S. C. C. A., 204 Fed. 859.

101. **Removal of Causes**—Right of.—The privilege of removal of causes from a state to a federal court is not a vested right, whether based on diversity of citizenship, or on the ground that the cause of action was created by federal law, but is wholly within the power of Congress, which may give or take away the right.—Teel v. Chesapeake & O. Ry. Co. of Virginia, U. S. C. C. A., 204 Fed. 918.

102. **Sales**—Damages.—Where seed is sold with a warranty that it is true to name, the measure of damages for a breach thereof, when it is actually sown and produces a crop, is the value of the crop which the seed was warranted to produce less the value of the crop actually raised.—Grafton-Stamps Drug Co. v. Williams, Miss., 62 So. 273.

103.——Burden of Proof.—A buyer is not liable for an article bought, unless the seller shows that he furnished the kind agreed to be bought. —Vinegar Bend Lumber Co. v. Soule Steam Feed Works, Ala., 62 So. 279.

104. **Street Railroads**—Punitive Damages.—Where a motorman was conscious of the probable consequences of his carelessness in running at a high speed and was indifferent to the danger of injury to the property of others attempting to cross the track, the railroad would be liable in punitive damages.—Montgomery Light & Traction Co. v. Riverside Co., Ala., 62 So. 311.

105. **Telegraphs and Telephones**—Proximate Cause.—A telegraph company which by an error in the transmission of a message notifying two persons that the sender would honor their joint draft enabled the two persons to negotiate their separate drafts for the amount mentioned is liable to the bank which cashed the drafts.—Western Union Telegraph Co. v. Farmers' & Merchants' Bank, Ala. 62 So. 250.

106. **Vendor and Purchaser**—Abatement of Price.—Where there can be no rescission of a purchase of real estate on the ground of the vendor's fraudulent misrepresentations as to area, damages by abatement of the price are not recoverable.—Conta v. Corigat, Wash., 132 Pac. 746.

107.——Deficiency.—The rule that a sale of land described by metes and bounds, followed by a statement of the number of acres, more or less, is a sale in gross so that there can be no recovery for any deficiency generally controls where no fraud is alleged.—Arrowsmith v. Nelson, Wash., 132 Pac. 743.

108. **Waters and Water Courses**—Prescription.—Defendant, by overflowing plaintiff's land without interruption for him 25 to 30 years in an adverse, open, and notorious manner, so as to have the exclusive use of the lands overflowed, acquired a prescriptive right to overflow them.—Crumbaugh v. Mobile & O. R. Co., Miss., 62 So. 233.

109. **Wills**—Burden of Proof.—Where contestants allege mental incapacity, proponents have the burden of showing mental capacity.—Byrne v. Byrne, Mo., 157 S. W. 609.

110.——Construction.—The words used in a will must be taken in their primary sense, a departure from which requires clear demonstration of the enlarged meaning apparent from the will itself.—Baker v. Baker, Ala., 62 So. 284.

111.——Public Policy.—It is not the policy of the law to seek grounds for avoiding devises and bequests, but rather to deal with both so as to uphold and enforce them if it can be done consistently with the rules of law.—St. Stephen's Episcopal Church v. Norris' Adm'r, Va., 78 S. E. 622.

112.——Testamentary Capacity. — Testator's knowledge and understanding as to the actual contents of his will are sufficient, though in point of fact he may have some erroneous opinions as to their legal effect; if he understands the effect as a whole, it is not material that he does not understand the meaning of all the technical terms used therein.—Conrades v. Heller, Md., 87 Atl. 28.

113.——Vesting.—Where a testator absolutely devised a sum of money to his grandson with the qualification that it was to be paid to him upon reaching his majority, the qualification does not create a contingency or a condition, operating to delay the vesting of the legacy.—State v. Main, Conn., 87 Atl. 38.

114. **Witnesses**—Confidential Communications. —The rule that confidential communications between husband and wife are privileged does not apply, where they are living in separation under articles of separation.—Holyoke v. Holyoke's Estate, Me., 87 Atl. 40.

115.——Hostility.—A party calling a hostile witness is not concluded by his testimony.—Moebius v. Williams, N. J. Supp. 87 Atl. 73.